313 U.S. 57

FILED
APR 30 1941
CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No. 1005

ORVILLE J. TAYLOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

JOHN S. MILLER,
JAMES J. MAGNER,
Attorneys for the Petitioner.

THE DUNTHORP-WARREN PRINTING COMPANY, 810 WEST JACKSON, CHICAGO

INDEX.

PAGE

Petition:

Opinions below 4

Jurisdiction 4

Questions presented 5

Statute involved 7

Statement of matter involved..... 2

Specification of errors to be urged..... 6

Reasons for granting writ..... 6

Brief in support of petition:

Argument:

I. A taxpayer, in order to establish a deductible loss, must offer clear and convincing proof 10

II. The evidence in this case showed beyond dispute that the facts subsisting until the year 1934 did not constitute clear and convincing proof but, on the contrary, gave rise to opposing and conflicting inferences, such that the taxpayer could not have established that the loss was sustained in 1933 (the year selected by the Commissioner and Board of Tax Appeals) or any other year prior to 1934 11

III. The Board of Tax Appeals and the Circuit Court of Appeals erroneously ruled that evidence which would not have entitled taxpayer to establish the loss in 1933 was sufficient to warrant the Commissioner and the Board of Tax Appeals in finding that the loss was sustained in that year..... 12

IV. Petitioner proved the original cost of the stock and facts which would have prevented him from determining that the loss was sustained in any year preceding 1934. This was sufficient proof that the pertinent property had a value in the year 1933..... 14

V. The pertinent statutory provisions as construed by the Circuit Court of Appeals violate the inhibitions of the Fifth Amendment of the Constitution of the United States 17

VI. Conclusion 17

Cases:

Brill v. Commissioner, 20 B. T. A. 495.....8, 13

Burnet v. Houston, 283 U. S. 223, 227.....8, 10

Ewing Thomas Converting Co. v. McCaughn, 43 F. (2d) 503, 505..... 8

Ladew v. Commissioner, 22 B. T. A. 443.....8, 13

Lawson v. Commissioner, 42 B. T. A. 1103....8, 15, 16

Lyon v. U. S., 5 Fed. Supp. 138, 139.....8, 13

New Colonial Ice Co. v. Helvering, 292 U. S. 435, 440 .....8, 10

U. S. v. S. S. White Dental Mfg. Co., 274 U. S. 398, 401 .....8, 10

Williamson Milling Co., Appeal of, 5 B. T. A. 814, 815 .....8, 13

Statute:

Sec. 23, Revenue Act of 1934, c. 277, 48 Stat. 680.. 7

Miscellaneous:

"The Time for Taking Deductions for Losses and Bad Debts for Income Tax Purposes."—Professor Robert C. Brown, 84 University of Pennsylvania Law Review, p. 41..... 17

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1940.

No.

ORVILLE J. TAYLOR,

Petitioner,

vs.

COMMISSIONER OF INTERNAL REVENUE,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

To the Honorable, the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

JUDGMENT SOUGHT TO BE REVIEWED.

Orville J. Taylor, petitioner, by his solicitors, prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals for the Seventh Circuit, entered January 31, 1941 (R. 113), affirming a decision of the United States Board of Tax Appeals (R. 81-91).

STATEMENT OF MATTER INVOLVED.*

At the close of the calendar year 1933, petitioner was the owner of 2,300 shares of the common stock of Studebaker Mail Order Company, a corporation of Illinois, representing an investment of $36,462.50 (R. 18). In June, 1934, at the suit of the Attorney General for the State of Illinois, the corporation was dissolved by a decree of the Superior Court of Cook County, Illinois, for failure to pay franchise taxes (R. 52, 53). Treating that dissolution (preceded in that year by the breakdown of plans of the officers for a reorganization of the corporation) as the identifiable event fixing the year 1934 as the year within which he had, within the meaning of the Revenue Act, *sustained* a loss, the petitioner claimed a deduction in the above-mentioned amount in his income tax return for the year 1934 (R. 63). The Commissioner of Internal Revenue disallowed the deduction and determined a deficiency in taxes against the petitioner in the amount of $8,320.24 on the ground that, in the determination of the Commissioner, the common stock of the Studebaker Mail Order Company had become worthless during the year 1933 and therefore petitioner had *sustained* his loss during that year. On a petition for a redetermination of the deficiency, the Board of Tax Appeals sustained the Commissioner. The Circuit Court of Appeals affirmed. Both affirmances flow from what petitioner conceives to be a misconception of the precise nature of the question presented to the Board of Tax Appeals by the petition for a redetermination of the deficiency.

Tersely stated, to justify the determination that the petitioner's loss was sustained during the year 1933, the Commissioner relied upon: (1) the formation and operation, during 1932 and 1933, of a creditors' committee for Stude-

* The facts appear in more detail in the opinion of the Circuit Court (R. 113-114).

baker Mail Order Company (R. 93); (2) the curtailment of business operations during 1933, called by respondent "cessation from business"; (3) voluntary settlements by Studebaker Mail Order Company with its trade and bank creditors, respectively, at less than the face amount of the debts due them (R. 83, 85); (4) the issuance of a letter during 1933 by the president of the corporation to the shareholders conceding the corporation's retirement from business (R. 78); (5) the delisting, in September 1933, of the corporation's stock issues from the lists of the Chicago Stock Exchange (R. 17).

Petitioner conceded that the foregoing events foreshadowed possible *ultimate* loss but insisted that such events were not indicative of a *present* loss, and, to rebut the inferences to be derived from the foregoing circumstances he pointed to the following: (1) the activities of the corporate officers during 1933 (in which he had participated) looking toward a possible reorganization of the company (R. 34); (2) the fact that there existed an over-the-counter market in the corporate stock after the delisting and during 1933, at prices ranging from 10 cents to 25 cents per share (R. 27, 28); (3) the fact that at the close of 1933 the corporation was still possessed of accounts receivable in the face amount of $580,000 (R. 56) which the undisputed evidence showed had some value after 1933 (R. 37, 38, 44, 45); (4) the retention of an option (not expiring until April 1934) to reacquire corporate real estate conveyed during 1933 to the bank creditors (R. 20, 21); and (5) a certain intangible good will value to the corporate name, attributable to the family name "Studebaker" (R. 22, 43).

It is petitioner's view that the relevant facts subsisting prior to January 1, 1934 were such as to give rise to opposing and conflicting inferences, and that there was no instant prior to January 1, 1934 when the taxpayer could have successfully asserted that the loss was sustained in

any given year; that (for example) there was no clear and convincing evidence of identifiable events that the loss was sustained in 1933 within the meaning of the Revenue Act and consequently that year could not be identified as the year in which his loss was sustained within the meaning of that act and the regulations thereunder; and that the opposing and conflicting inferences relative to the year 1933, which are reasonably to be drawn from the evidence upon the hearing before the Board of Tax Appeals, cannot, as a matter of law (as contended by the Government), constitute evidence that the stock became worthless in 1933.

JURISDICTION.

The jurisdiction of this court is invoked under Judicial Code, Sec. 240a, 28 U. S. C., Sec. 347a.

The judgment of the Circuit Court of Appeals was entered on January 31, 1941.

OPINIONS BELOW.

The opinion of the Circuit Court of Appeals (per Sparks, *C. J.*) is published in 117 F. (2d) 189 (R. 113).

The Board of Tax Appeals (per Opper, *M. B.*) filed a memorandum opinion (R. 81-91).

QUESTIONS PRESENTED.

I.

Can the Commissioner lawfully disallow a deduction on the ground—not that there was not any loss—but that the loss was sustained in a prior year, when the facts in evidence with respect to that prior year do not constitute clear and convincing proof, but, on the contrary, give rise to opposing inferences such as would have prevented the taxpayer from determining that the loss was sustained in such prior year?

II.

Can the Commissioner lawfully disallow a deduction on the ground—not that there was not any loss—but that the loss was sustained in a prior year, when the evidence shows that in that prior year the taxpayer himself could not have determined that the loss was sustained in that year?

III.

Must a taxpayer, in order to establish that a loss was sustained in a given year, prove that the pertinent property had a value in the preceding year, beyond proving such facts as would have prevented the taxpayer from determining that the loss was *sustained* in *any* preceding year?

IV.

Did the Circuit Court of Appeals correctly construe the pertinent statutory provisions?

V.

Do the pertinent statutory provisions as construed by the Circuit Court of Appeals, violate the inhibitions of the Fifth Amendment of the Constitution of the United States?

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

(1) The Circuit Court of Appeals has decided an important question of Federal law which has not been but should be settled by this court, namely: whether, under Sec. 23 of the Revenue Act of 1934, Chap. 277, 48 Stat. 680, and similar provisions in other revenue laws and regulations, the Government may determine that a loss has been sustained by the weight of the evidence and at the same time require that the taxpayer must determine the identical question by clear and convincing proof.

(2) The Circuit Court of Appeals has in this case decided a Federal question in a way probably in conflict with applicable decisions of this court, viz., by deciding that the Board of Tax Appeals may find that a loss was sustained in a given year upon evidence which would not have justified the taxpayer in determining that the loss was sustained in that year.

SPECIFICATIONS OF ERRORS TO BE URGED.

(1) The Circuit Court erred in holding that facts which would not have justified the taxpayer in determining that the loss was incurred prior to 1934 did, as a matter of law, support the Commissioner and Board of Tax Appeals in finding that the loss was incurred prior to that year and disallowing the loss in that year.

(2) The Circuit Court erred in holding that a criterion of loss is available to the Government but not to the taxpayer; and that although a taxpayer could not have taken a loss prior to a given year, the Commissioner and Board of Tax Appeals may find that the loss was sustained prior to that year and thereby disallow the loss in that year.

(3) The Circuit Court erred in holding that the Commissioner and Board of Tax Appeals may determine the

year in which the loss was sustained by the *weight of the evidence;* whereas, the taxpayer must base his determination upon *clear and convincing proof.*

(4) The Circuit Court erred in not overruling the decision of the Board of Tax Appeals.

(5) The Circuit Court erred in affirming the decision of the Board of Tax Appeals.

(6) The Circuit Court erred in not holding that petitioner was entitled to a deduction for gross income, in his income tax return for the calendar year 1934, in the sum of $36,462.50, as shown in his return.

STATUTE INVOLVED.

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 23. DEDUCTIONS FROM GROSS INCOME.

In computing net income there shall be allowed as deductions:

* * * * *

(e) *Losses by Individuals.*—In the case of an individual, losses sustained during the taxable year and not compensated for by insurance or otherwise—

(1) if incurred in trade or business; or

(2) if incurred in any transaction entered into for profit, though not connected with the trade or business; or

(3) of property not connected with the trade or business, if the loss arises from fires, storms, shipwreck, or other casualty, or from theft. * * *